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No. 99-424

In the
Supreme Court of the United States
October Term, 1999

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, and RUSSELL ANDERSON, on behalf of themselves and all others similarly situated,
Petitioners,

v.

NORTH CAROLINA DIVISION OF MOTOR VEHICLES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

MICHAEL F. EASLEY
North Carolina Attorney General

James Peeler Smith,* Special Deputy Attorney General
Harold F. Askins, Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900

**Counsel of Record*

OFFICE OF THE CLERK

QUESTIONS PRESENTED

1. DOES AN IMPLEMENTING REGULATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990, WHICH REGULATION PROHIBITS A PUBLIC ENTITY FROM PLACING A SURCHARGE TO COVER THE COST OF MEASURES REQUIRED TO PROVIDE NONDISCRIMINATORY TREATMENT TO ANY PERSON OR GROUP OF PERSONS WITH DISABILITIES, PROHIBIT A STATE FROM CHARGING A MODEST FEE TO DEFRAY THE COST OF VOLUNTARILY PROVIDING "HANDICAPPED" WINDSHIELD PLACARDS TO MOBILITY IMPAIRED PERSONS SO THAT VEHICLES TRANSPORTING THEM MAY PARK IN SPACES RESERVED FOR SUCH VEHICLES?

2. IF SO, IS THE REGULATION A VALID EXERCISE OF CONGRESS'S POWERS TO ENFORCE THE FOURTEENTH AMENDMENT SO AS TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY FROM SUIT?

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BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Respondent believes that this case presents a question of Congress's power to enforce the Fourteenth Amendment only if it is determined that the States' power to impose a minimal charge for the issuance of a special parking placard for mobility disabled persons is prohibited by 28 C.F.R. § 35.130(f). In addition to the constitutional provisions, statutes and regulations cited by petitioners, other statutes and regulations

involved are as follows: N.C. GEN. STAT. §§ 20-37.5, -37.6, Public Law 100-641, and 23 C.F.R. § 1235. These statutes and regulations are set out in the Appendix hereto.

STATEMENT OF THE CASE

A.

Since 1972 North Carolina has maintained a system for providing parking spaces for persons with mobility impairments. N.C. GEN. STAT. ch. 20, art 2A (1998). (App. 1a.) Under current State law, upon presentation of a doctor's certification, any vehicle owner with either a permanent or temporary mobility impairment may obtain a license plate authorizing the vehicle to park in a space reserved for the handicapped. N.C. GEN. STAT. § 37.6(a) (1998). (App. 3a.) Additionally, any mobility impaired person may obtain as many as two placards designating a vehicle authorized to park in a reserved space. N.C. GEN. STAT. § 37.6(c) (1998). (App. 3a.) The cost of a placard is $5.00 and the placard is good for five years. *Id.* (App. 3a.) A vehicle bearing one of these familiar placards may park in any space reserved for such vehicles, regardless of whether the space is located on a government-owned parking lot, the public streets, or at a shopping center.

Article 2A was enacted by the General Assembly pursuant to the Uniform System for Handicapped Parking ("USHP") (25 C.F.R. 1235), which implements Pub. L. No. 100-641, 102 Stat. 3335 (Nov. 9, 1988). (App. 7a.) The purpose of the USHP

is "to provide guidelines to States for the establishment of a uniform system for handicapped parking for persons with disabilities to enhance access and the safety of persons with disabilities which limit or impair the ability to walk." 23 C.F.R. § 1235.1 (1991). (App. 11a.) These regulations provide that "[s]pecial license plates, removable windshield placards, or temporary removable windshield placards displaying the International Symbol of Access shall be the only recognized means of identifying vehicles permitted to utilize parking spaces reserved for persons with disabilities which limit or impair the ability to walk." 23 C.F.R. § 1235.6 (1996). (App. 13a.)

The State is not required by the Americans with Disabilities Act (ADA) of 1990, to issue either special license plates or placards. Implementing regulations to Title III of the ADA govern the dimensions of parking spaces, of parking access aisles for disabled persons, and the ratio of parking spaces available for employees and visitors. App. A to 28 C.F.R. Pt. 36, §§ 4.1.2. and 4.6. Neither these regulations nor any others issued pursuant to the ADA, however, purport to regulate who shall be entitled to park in spaces reserved for the mobility impaired. These matters are governed specifically by the USHP and State law. Virtually every State has enacted statutes implementing the USHP.

B.

Plaintiffs, five persons with mobility impairments, brought this class action in which they allege that the charge imposed

by the North Carolina Division of Motor Vehicles ("DMV") for the issuance of a removable windshield placard ("placard") for vehicles transporting persons with mobility impairments violates 42 U.S.C. § 12132 (providing that disabled persons shall not be denied "the benefit of the services, programs, or activities of a public entity" or subjected to discrimination by reason of such disability), and 28 C.F.R. § 35.130(f) ("§ 35.130(f)" or "the regulation"), an implementing regulation of the ADA. The regulation provides that

> [a] public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. § 35.130(f) (1999)

The district court granted the DMV's motion to dismiss on the grounds that the action was barred by the Eleventh Amendment. The Court of Appeals for the Fourth Circuit affirmed, but on the narrower ground that § 35.130(f) exceeded Congress's Fourteenth Amendment enforcement powers, and therefore did not abrogate the States' Eleventh Amendment immunity. Plaintiffs' motion for rehearing and rehearing *en banc* was denied on May 11, 1999.

The majority opinion of the Fourth Circuit followed the analysis employed by this Court in *Seminole Tribe v. Florida*,

517 U.S. 44 (1996). *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698, 703 (1999) (*Pet. App.* A-7). At the outset, the court rejected the contention of the United States that courts should "look broadly at the entire statutory framework--here Title II of the ADA--and ratify its constitutionality without looking at the validity of its individual provisions or the agency regulations promulgated under its authority" to determine whether the States' immunity was validly abrogated. The court reasoned that such a "broad brush review" would require courts "to ratify unnecessarily the constitutionality of every provision in the title." *Id.* (*Pet. App.* A-9). The court also found that the need for administrability required review of individual provisions in the event that only parts of the title were found to be unconstitutional. *Id.* at 704 (*Pet. App.* A-10). Finally, the court concluded that "the crucial federalism concerns that animate the Eleventh Amendment," (*Pet. App.* A-10), necessitate review of the individual provisions lest the "important state interests in immunity" be left "under protected." *Id.* (*Pet. App.* A-11). The court also reasoned that considering only the constitutionality of the statute without reference to the constitutionality of the implementing regulation would permit the States to be sued pursuant to an unconstitutional agency regulation. *Id.* (*Pet. App.* A-11). Thus, the court concluded that "[r]easons of separation of powers, administrability, and federalism . . . dictate a searching review of the legal basis for suit. . . . [I]n determining whether it was acting pursuant to a valid exercise of power, we examine the legality of the specific statute and regulation whose asserted violation by state government gave

rise to the claim for relief in federal court." *Id.* at 705 (*Pet. App.* A-12).

The court then examined whether the State's immunity was effectively abrogated by the regulation. *Id.* (*Pet. App.* A-12). The court found that in enacting the ADA Congress clearly stated its intent to abrogate the States' sovereign immunity, *id.*, and that in so doing Congress "'invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment. . . . 42 U.S.C. §12101(b)(4).'" *Id.* (*Pet. App.* A-13). But Congress's Section 5 power was limited to remedying violations of rights protected by the Amendment; Congress has no power "to define the substance of those right." *Id.*, *citing City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (*Pet. App.* A-13).

The court recognized that "[u]nder *Boerne*, Section 5 enactments must target unconstitutional state action. The Constitution, however, has given state governments significant latitude in dealing with problems of disability."*Id.* at 706 (*Pet. App.* A-15). Relying on *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the court held that the constitutionality of statutes affecting the disabled must be reviewed on a rational-basis test. *Id.* (*Pet. App.* A-16).

The Court explained why the sweep of § 35.130(f) unconstitutionally intruded upon the "basic ability [of state governments] to provide for their own citizens' health and welfare." *Id.* at 707 (*Pet. App.* A-17).

> Here Congress, through the Attorney General, acted to ban state surcharges designed to recover the costs of programs provided for the benefit of disabled persons. Such an act is only sustainable under the Section 5 power if many of those surcharges "have a significant likelihood of being unconstitutional." [*Bourne*, 117 S. Ct.] at 2170. In view of the efforts of states to assist the handicapped, including the admirable efforts of North Carolina which are at issue here, that likelihood is not apparent to this court. Nor has any party pointed us to any support in the legislative record for the proposition that state surcharges for handicapped programs are motivated by animus toward the class. It may well be that some subset of those surcharges is in fact so motivated. But on the record before us, we can only believe that most fees are like that imposed by North Carolina law--a modest cost-recovery mechanism rationally employed to recoup the costs of programs aimed at assisting persons with disabilities. Such a fee is rationally based and perfectly constitutional under *Cleburne*.

Id. (*Pet. App.* A-16-A-17).

The court proceeded to find that the regulation could not be justified as a prophylactic measure because it was disproportionate and incongruent to the "underlying unconstitutional state action" [though no such action has been identified]. *Id.* (*Pet. App.* A-16). Finally, the court concluded that the regulation created a "positive entitlement to a free handicapped parking space." *Id.* at 708 (*Pet. App.* A-18). As such it transforms the Equal Protection Clause from "a prohibition on invidious state action into a charter of positive

rights. Such a step, however, is beyond the scope of the Fourteenth Amendment." *Id.*

Judge Murnaghan, dissenting, disagreed with the majority's analysis. First, he could find nothing to indicate that "§ 35.130(f) is anything like the now discredited [Religious Freedom Restoration Act]." *Id.* (*Pet. App.* A-21). He then opined that the fact that the disabled were not a suspect class did not preclude Congress's legislating to protect a class of people that it found to be victims of invidious discrimination. *Id.* at 708-09 (*Pet. App.* A-21-A-22). The dissent reasoned that the regulation did not create an entitlement to a free parking space. Judge Murnaghan summarized his view as follows:

> It makes no more sense to allow states to recoup from the disabled the costs of providing the remedial programs needed to fully integrate them into society than it would, for example, to permit universities receiving federal funding to charge women higher tuition rates to cover the cost of complying with Title IX of the Civil Rights Act of 1964.

Id. at 709-10 (*Pet. App.* A-18).

REASONS FOR DENYING THE WRIT

The Fourth Circuit correctly held that "28 C.F.R. § 35.130(f), which prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 power. As such, it

is not a constitutionally valid exercise of power, and the effort to abrogate must fail." *Id.* at 705 (*Pet. App.* A-13).

The court's narrow focus on the regulation rather than on Title II as a whole properly takes into account the principle of federalism, which undergirds the structure of the Constitution, and avoids unnecessarily deciding constitutional questions which may reasonably be avoided. If this Court should issue its writ of certiorari in this case, it should do so to affirm the analytical approach and decision of the Fourth Circuit in this case.

I. BECAUSE THE DECISION OF THE COURT BELOW IS CORRECT, IT IS NOT NECESSARY FOR THIS COURT TO GRANT CERTIORARI TO REVIEW THE DECISION.

A. The Regulation Exceeds The Powers Of Congress To Enforce The Fourteenth Amendment.

Petitioners' argument begins with the false premise that the minimal fee charged by the State for the windshield placard is a charge for the cost of providing mobility impaired persons with non-discriminatory treatment. Petitioners urge this Court to issue its writ of certiorari, reverse the court below, and adopt the reasoning of Judge Murnaghan, who accepted petitioners' false premise and based his dissent upon it. This Court should not do so.

According to Judge Murnaghan in his dissent below, "[a]ll § 35.130(f) really stands for . . . is the unspectacular proposition that a state may not recover from victims of discrimination the cost of ending discrimination against those victims." 166 F.3d at 708. (*Pet. App.* A-21). Although this may describe the intent of the drafters of the regulation, the description is completely inaccurate when the regulation is applied to North Carolina's minimal charge for the placard.

First, the statement is wrong because the placard is not a measure to end discrimination. Rather, the purpose of the placard is to enhance the ability of persons with mobility impairments to more easily and fully partake of the benefits of society, not to end invidious discrimination. Past failures of architects and engineers to make buildings accessible to the handicapped were not acts of intentional discrimination against them. Nor was the failure to designate special parking places a discriminatory act or omission by building owners or managers against those with mobility impairments.[1] Moreover, the failure of private entities to make their facilities more accessible to those with mobility impairments cannot be imputed to the State. If, indeed, the ADA is read to define such conduct as discrimination prohibited by the Fourteenth Amendment, then

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[1] *But see* Judge Murnaghan's concurring opinion in *Amos v. Maryland Department of Correction*, 178 F.3d 212, 224 (4th Cir. 1999) ("A state's decision to construct facilities and design programs as if the disabled are not a part of society stems from attitudes formed during a 'lengthy and tragic history of segregation and discrimination,' *City of Cleburne*, 473 U.S. at 461 (Marshall, J., concurring in the judgment in part and dissenting in part) (quoting *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 303 (1978).").

Congress has attempted unlawfully to redefine the scope and meaning of the amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding unconstitutional the Religious Freedom Restoration Act as in excess of Congress's power to enforce the Fourteenth Amendment and a violation of the separation-of-powers doctrine).

Second, the above-quoted statement from the dissent in the case below is wrong because the measure is not an attempt to recover the cost of ending discrimination against those with mobility impairments. The dissent's comparison of the fee for the placards to the costs for complying with Title IX of the Civil Rights Act of 1964, 166 F.3d at 709-10 (*Pet. App.* A-23; A-24), is completely erroneous. The minimal fee is charged for a beneficial service voluntarily provided by the State, not one which the State is under a legal obligation to provide.

The dissent below further errs in saying that "[t]he regulation . . . merely ensures that the costs of correcting the wrongs inflicted upon the disabled will be borne by the wrongdoer (the state) rather than the victim (the disabled individual or group)." *Id.* at 709. (*Pet. App.* A-22). Most of the measures imposed by the ADA on private and public entities have nothing to do with ending discrimination, at least as that term is used in its constitutional sense. Rather, as noted above, the special placards and license plates increase the ability of disabled persons to enjoy the benefits of society to the same extent as persons without disabilities. There is no "wrongdoing" by anyone. Except in rare instances, there is no

discrimination at all. Thus, to call the State a "wrongdoer" is not only wrong, it is unfair.

Petitioners' other arguments for certiorari are equally invalid. It is simply not correct to say that the majority opinion "would permit states to undermine the ADA by imposing surcharges on individuals with disabilities whenever they use public services." (*Pet.* at 7.) Such a statement goes beyond hyperbole. This case did not involve an attempt by the State to charge the disabled for the cost of building an access ramp or installing a special elevator for them. The State has never contemplated, much less attempted, to charge for modifications to facilities to make them more accessible to the disabled.

Petitioners also engage in gross exaggeration in their paraphrase of Chief Justice Marshall's famous quote in *McCulloch v. Maryland*, 4 Wheat 316, 431 (1819). They assert that the State's "power to charge a fee on access is the power to destroy the right of access." (*Pet.* at 8.) Perhaps the simplest answer would be to paraphrase Justice Holmes's equally famous response in *Panhandle Oil Co. v. State of Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting): The power to charge a fee is not the power to destroy while the courts sit.[2]

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[2] Petitioners' citation of *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (holding the $1.50 Virginia poll tax unconstitutional) (*Pet.* at 8.) is completely inapposite. DMV does not argue that the charge for the placards is constitutional because it is minimal. The charge is constitutional because it is rationally related to the cost of providing a service. No one has suggested that the purpose or effect of the charge is to prevent poor disabled

Petitioners would have the Court treat the fee as if it were a legislative enactment affecting a suspect class. In *City of Cleburne*, 473 U.S. 432, this Court refused to treat the mentally retarded as a quasi-suspect class and thereby subject legislation affecting the retarded to heightened scrutiny. Consequently, State legislation affecting the disabled is reviewed only to determine whether the legislation is rationally related to a legitimate governmental purpose. *Id.* It is unquestionably rational for the State of North Carolina to charge a minimal fee to defray the cost of voluntarily providing a beneficial service to the handicapped. Under the aegis of Section 5, Congress has no power to outlaw a fee that is not invidiously discriminatory per se nor used to discriminate. *Cf. Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding Congressional ban on literacy tests, which in fact had been used to prevent African-Americans from voting).

Petitioners' arguments in support of certiorari will not withstand careful analysis. The charge is not an attempt by the State to recover the cost of a measure required to end discrimination against persons with mobility impairments. The fee is a modest, rationally based measure to defray the cost of the State's voluntarily providing a beneficial service to the disabled. The majority opinion below correctly held that the regulation is not congruent or proportional to any identifiable constitutional violation. Indeed, nothing in the Congressional findings indicates that the States have singled out the disabled

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people from parking. Nor does the charge impinge upon the exercise of a fundamental right like voting.

by charging them for the cost of remedial measures. The regulation's sweep, however, is so broad as to ban even State charges, such as the fee at issue in the instant case, that are neither discriminatory nor required to provide nondiscriminatory treatment. 166 F.3d at 707. The majority correctly decided the issue; therefore, the opinion of the court below should be left undisturbed by this Court.

B. The Panel Correctly Decided The Jurisdictional Issue On The Basis Of The Regulation On Which Plaintiffs' Claim Was Based Rather Than Considering The ADA As A Whole.

It is axiomatic that a case should be decided on the narrowest ground possible. *Ashwander v. T.V.A.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). It is a cornerstone of adjudication that a court should not decide constitutional questions unless to do so is not reasonably avoidable. *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 104 (1944); *Ashwander*, 297 U.S. at 346-48. Petitioners fault the panel majority for their adherence to these established principles of judicial decision-making.

In enacting the ADA, Congress announced its intention "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day." 42 U.S.C. § 12101(b)(4)(1995). A review of the Congressional findings, 42 U.S.C. §12101, and individual provisions of the Act quickly shows that Congress was

concerned not only with ending intentional discrimination against the disabled, but also, and probably more so, with eliminating physical barriers that hindered full participation in society by the disabled. The Act was aimed at both the public and private sectors. Because of the broad scope of the Act, it is necessary to examine its provisions individually to determine whether they are founded on the Commerce Clause, the Fourteenth Amendment, or possibly some other constitutional provision. Obviously, measures that may be valid under one provision of the Constitution may not be sustainable under another.

In its answer and briefs, DMV contended that the ADA did not effectively override the States' immunity. The district court agreed and dismissed the action. However, the order of the district court was broader than necessary to determine the immediate question presented. Had the district court order stood, no private action could have been brought under the ADA against a State by a citizen in federal court. The Fourth Circuit's narrower approach appropriately avoided reaching this question. Because North Carolina had not waived its immunity or consented to federal jurisdiction, and the DMV acknowledged that Congress clearly intended to override the State's immunity, the court properly limited its inquiry to whether the regulation at issue was a valid measure under Section 5 of the Fourteenth Amendment. The court declined to employ a "broad-brush review" in order to avoid unnecessarily passing on whether Title II effectively abrogated the States' immunity. Likewise, the court refused to decide the constitutionality of an entire statute based on a challenge to one

provision of that statute. 166 F.3d at 703-04. Moreover, concerns of federalism and the States' Eleventh Amendment immunity militated against a broad-brush review. The court appropriately recognized that "[r]atifying an entire title and finding abrogation without examining the actual, specific legal basis for suit could subject a state to suit in federal court pursuant to an unconstitutional provision buried in the midst of an otherwise constitutional statutory scheme." *Id.* at 704. (*Pet. App.* A-11). Furthermore, to review the statute without reviewing the regulation "would lead to the abrogation of immunity in cases even where the agency rule was unconstitutional or beyond the bounds of delegated authority." *Id.* (*Pet. App.* A-11).[3]

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[3] Petitioners also argue that the Fourth Circuit misapplied *City of Boerne*, 521 U.S. 507. (*Pet.* at 10). The court did not err. Even given its broad Section 5 enforcement powers, Congress does not have the power to require the States to provide free of charge a service to the disabled, assuming the disabled were treated as a suspect class. If the regulation has the effect of requiring States to provide the service but prohibits them from charging for it, the regulation would violate *Boerne*'s proportionality and congruence test. Furthermore, such an interpretation of the regulation would also violate *New York v. United States*, 505 U.S. 144 (1992), by commandeering the States' legislative and administrative processes, and *Printz v. United States*, 521 U.S. 898 (1997), by commandeering the resources of the States.

II. THE CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN *DARE V. CALIFORNIA* DOES NOT REQUIRE THIS COURT TO GRANT CERTIORARI IN THE INSTANT CASE.

Petitioners have filed a supplemental brief in which they cite *Dare v. California*, 1999 WL 717724 (9th Cir. Sept. 16, 1999) (petition for rehearing and suggestion for rehearing *en banc* filed Sept. 30, 1999) (App. 15a), as creating a conflict between the circuits requiring this Court to grant certiorari. In *Dare*, the Ninth Circuit considered a challenge to California's charge for the parking placard. California's provision of special license plates and placards for persons with mobility disabilities was pursuant to the USHP and is quite similar to the program in North Carolina. The majority opinion found that the fee charged by California violated § 35.130(f).

The *Dare* majority first concluded that the placards were in fact measures required to provide persons who have mobility disabilities with nondiscriminatory treatment. (App. 24a.) The Ninth Circuit did not employ the Fourth Circuit's surgical approach of examining whether the regulation, as opposed to Title II, effectively abrogated the States' immunity. (App. 20a.) The court then found that UHSP was merely "hortatory" and had no effect on the court's analysis. (App. 23a) ("Even California concedes that in recognizing principles of federalism and state sovereignty, Congress rendered state compliance with Public Law 100-641 completely voluntary.")). The majority then found that the placards were required to provide nondiscriminatory treatment for the mobility disabled. The majority reasoned as follows:

> The ADA requires special parking arrangements such as handicapped parking spaces. These spaces allow disabled people equal access to public buildings in which California provides services, programs, and activities. Because California polices handicapped parking spaces, disabled people need placards or license plates to use them. California thus meets the ADA's requirement for nondiscriminatory access to public buildings by providing disabled people with placards and license plates.

Dare, 1999 WL 717724, at *4. (App. 24a.) By this faulty syllogism, the majority found the special license plates and placards mandated by the ADA, even though the multitude of explicit regulations promulgated to implement the Act have no such requirement. Having found that the ADA itself mandates the placard program, the majority concluded that the charge violates the ADA. (App. 25a.)The *Dare* majority then noted that it adhered to the Ninth Circuit's decision in *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir. 1997) (holding that the ADA validly abrogated the States' Eleventh Amendment immunity), *cert. denied*, 118 S. Ct. 2340 (1998) (App. 26a).[4]

Judge Fernandez dissented, however, on the ground that the fee did not violate the ADA.

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[4] Likewise, the Fourth Circuit held in *Amos*, 178 F.3d 212 that the ADA was a valid exercise of Congress's Section 5 enforcement powers. The *Amos* majority distinguished *Brown*, 178 F.3d at 221 n.8, but Judge Williams, dissenting, felt that the reasoning in *Brown* controlled the case. 178 F.3d at 225.

> Nothing in the law requires that California police usage of the spaces in order to assure that only disabled people are taking advantage of them. Indeed, if the federal government decided that usage must be policed by the states, that would come at least parlously close to an attempt to "commandeer state government" into enforcing a federal government policy at state cost. *See Printz*, 521 U.S. at ---, 117 S. Ct. at 2381.

Dare, 1999 WL 717724, at *10. (App. 39a.) Judge Fernandez also noted the USHP. He observed that the USHP provides that there should be no additional charge for special license plates but is silent as to placards. Such silence "suggests that Congress did not see anything particularly discriminatory in the exaction of a small fee for the issuance of placards, if any were issued at all." *Id.* at *11. (App. 40a.)

It is respectfully suggested that should the State of California submit a petition for writ of certiorari in this Court to review the *Dare* decision, that the writ should be issued in order to reverse the Ninth Circuit's holding in that case and hold instead that the charge for the placards does not violate § 35.130(f), as Judge Fernandez concluded. If this Court should find that the charge does violate the regulation, then the Court should hold, as did the Fourth Circuit, that the regulation exceeds the powers of Congress to enforce the Fourteenth Amendment.

CONCLUSION

Because the Fourth Circuit correctly held that the regulation exceeded the powers of Congress to enforce the Fourteenth Amendment, the States' Eleventh Amendment immunity was not abrogated by the regulation. It is, therefore, not necessary for this Court to issue its writ of certiorari to correct the holding of the court below. The question of whether Congress effectively overrode the State's Eleventh Amendment immunity is not necessarily before the Court. Only if the Court should find that the Fourth Circuit erred by the narrow scope of its opinion would it be necessary to decide the issue of whether the ADA validly abrogated the States' Eleventh Amendment immunity. That issue, however, is before the Court in *Florida Department of Corrections v. Wellington, No. 98-829, pet. for cert. filed, Nov.16, 1998,* and is also presented in *Alsbrook v.City of Maumelle*, No. 99-423, *pet. for cert. filed* Sept. 8, 1999.[5]

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[5] One of the questions presented in the petition for certiorari in *Maumelle* was the following:

> Whether the ADA was a proper exercise of the power granted to Congress by § 5 of the Fourteenth Amendment to the United States Constitution such that the immunity granted to the State of Arkansas by the Eleventh Amendment to the United States Constitution was abrogated.

Respectfully submitted.

MICHAEL F. EASLEY
North Carolina Attorney General

James Peeler Smith*
Special Deputy Attorney General

Harold F. Askins
Special Deputy Attorney General

October 20, 1999

*Counsel of Record

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WEST'S NORTH CAROLINA STATUTES
CHAPTER 20. MOTOR VEHICLES
ARTICLE 2A. AFFLICTED, DISABLED OR HANDICAPPED PERSONS

Current through end of 1998 legislation

§ 20-37.5. Definitions

Unless the context requires otherwise, the following definitions apply throughout this Article to the defined words and phrases and their cognates:

(1) "Distinguishing license plate" means a license plate that displays the International Symbol of Access using the same color, size of plate, and size of letters or numbers as a regular plate.

(2) "Handicapped" shall mean a person with a mobility impairment who, as determined by a licensed physician:

a. Cannot walk 200 feet without stopping to rest;

b. Cannot walk without the use of, or assistance from, a brace, cane, crutch, another person, prosthetic device, wheelchair, or other assistive device;

c. Is restricted by lung disease to such an extent that the person's forced (respiratory) expiratory volume of one second, when measured by spirometry, is less than one liter, or the arterial oxygen tension is less than 60 mm/hg on room

air at rest;

d. Uses portable oxygen;

e. Has a cardiac condition to the extent that the person's functional limitations are classified in severity as Class III or Class IV according to standards set by the American Heart Association;

f. Is severely limited in their ability to walk due to an arthritic, neurological, or orthopedic condition; or

g. Is totally blind or whose vision with glasses is so defective as to prevent the performance of ordinary activity for which eyesight is essential, as certified by a licensed ophthalmologist, optometrist, or the Division of Services for the Blind.

(3) "International Symbol of Access" means the symboladopted by Rehabilitation International in 1969 at its Eleventh World Congress on Rehabilitation of the Disabled.

(4) "Removable windshield placard" means a two-sided, hooked placard which includes on each side:

a. The International Symbol of Access, which is at least three inches in height, centered on the placard, and is white on a blue shield;

b. An identification number;

c. An expiration date; and

d. The seal or other identification of the issuing authority.

N.C. GEN. STAT. § 20-37.6

WEST'S NORTH CAROLINA STATUTES
CHAPTER 20. MOTOR VEHICLES
ARTICLE 2A. AFFLICTED, DISABLED OR HANDICAPPED PERSONS

Current through end of 1998 legislation

§ 20-37.6. Parking privileges for handicapped drivers and passengers

(a) General Parking.--Any vehicle that is driven by or is transporting a person who is handicapped and that displays a distinguishing license plate, a removable windshield placard, or a temporary removable windshield placard may be parked for unlimited periods in parking zones restricted as to the length of time parking is permitted. . . . Any qualifying vehicle may park in spaces designated as restricted to vehicles driven by or transporting the handicapped.

(b) Handicapped Car Owners; Distinguishing License Plates.--If the handicapped person is a registered owner of a vehicle, the owner may apply for and display a distinguishing license plate. This license plate shall be issued for the normal fee applicable to standard license plates. Any vehicle owner who qualifies for a distinguishing license plate may also receive one removable windshield placard.

(c) Handicapped Drivers and Passengers; Distinguishing

Placards.--A handicapped person may apply for the issuance of a removable windshield placard or a temporary removable windshield placard. Upon request, one additional placard may be issued to applicants who do not have a distinguishing license plate. . . . The Division shall establish procedures for the issuance of the placards and may charge a fee sufficient to pay the actual cost of issuance, but in no event less than five dollars ($5.00) per placard.

(c1) Application and Renewal; Physician's Certification.--The initial application for a distinguishing license plate, removable windshield placard, or temporary removable windshield placard shall be accompanied by a certification of a licensed physician, ophthalmologist, or optometrist or of the Division of Services for the Blind that the applicant is handicapped. The application for a temporary removable windshield placard shall contain additional certification to include the period of time the certifying authority determines the applicant will have the disability. Distinguishing license plates shall be renewed annually, but subsequent applications shall not require a medical certification that the applicant is handicapped. Removable windshield placards shall be renewed every five years, and the renewal shall require a medical recertification that the person is handicapped. Temporary removable windshield placards shall expire no later than six months after issuance.

(c2) Existing Placards; Expiration; Exchange for New Placards.--All existing placards shall expire on January 1, 1992. No person shall be convicted of parking in violation of

this Article by reason of an expired placard if the defendant produces in court, at the time of trial on the illegal parking charge, an expired placard and a renewed placard issued within 30 days of the expiration date of the expired placard and which would have been a defense to the charge had it been issued prior to the time of the alleged offense. Existing placards issued on or after July 1, 1989, may be exchanged without charge for the new placards.

(c3) It shall be unlawful to sell a distinguishing license plate, a removable windshield placard, or a temporary removable windshield placard issued pursuant to this section. A violation of this subsection shall be a Class 2 misdemeanor and may be punished pursuant to G.S. 20-176(c) and (c1).

. . . .

(f) Penalties for Violation.--

. . . .

(4) Notwithstanding any other provision of the General Statutes, the provisions of this section relative to handicapped parking shall be enforced by State, county, city and other municipal authorities in their respective jurisdictions whether on public or private property in the same manner as is used to enforce other parking laws and ordinances by said agencies.

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Portions of 102 Stat. 3335 (1988)

UNITED STATES PUBLIC LAWS
100th Congress - Second Session
Convening January 25, 1988

PL 100-641 (HR 3327)
November 9, 1988

. . . .

SEC. 3. "23 USC 402 note" HANDICAPPED PARKING SYSTEM.

(a) REGULATIONS. -- Not later than the 180th day following the date of the enactment of this Act, the Secretary of Transportation shall issue regulations --

(1) which establish a uniform system for handicapped parking designed to enhance the safety of handicapped individuals, and
(2) which encourage adoption of such system by all the States.

In issuing such regulations, the Secretary shall consult the States.

(b) DEFINITIONS. -- For purposes of this section --

(1) UNIFORM SYSTEM FOR HANDICAPPED

PARKING. -- A uniform system for handicapped parking designed to enhance the safety of handicapped individuals is a system which --

(A) adopts the International Symbol of Access (as adopted by Rehabilitation International in 1969 at its 11th World Congress on Rehabilitation of the Disabled) as the only recognized symbol for the identification of vehicles used for transporting individuals with handicaps which limit or impair the ability to walk;

(B) provides for the issuance of license plates displaying the International Symbol of Access for vehicles which will be used to transport individuals with handicaps which limit or impair the ability to walk, under criteria determined by the State;

(C) provides for the issuance of removable windshield placards (displaying the International Symbol of Access to individuals with handicaps which limit or impair the ability to walk, under criteria determined by the State;

(D) provides that fees charged for the licensing or registration of a vehicle used to transport individuals with handicaps do not exceed fees charged

for the licensing or registration of other similar vehicles operated in the State; and

(E) for purposes of easy access parking, recognizes licenses and placards displaying the International Symbol of Access which have been issued by other States and countries.

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23 C.F.R. §§ 1235.1, 1235.2, 1235.3, 1235.4, 1235.5, 1235.6, 1235.8 (1991)

§ 1235.1 Purpose.

The purpose of this part is to provide guidelines to States for the establishment of a uniform system for handicapped parking for persons with disabilities to enhance access and the safety of persons with disabilities which limit or impair the ability to walk.

§ 1235.2 Definitions.

Terms used in this part are defined as follows:

(a) *International Symbol of Access* means the symbol adopted by Rehabilitation International in 1969 at its Eleventh World Congress on Rehabilitation of the Disabled.

(b) *Persons with disabilities which limit or impair the ability to walk* means persons who, as determined by a licensed physician:

(1) Cannot walk two hundred feet without stopping to rest; or

(2) Cannot walk without the use of, or assistance from, a brace, cane, crutch, another person, prosthetic device, wheelchair, or other assistive device; or

(3) Are restricted by lung disease to such an extent that the person's forced (respiratory) expiratory volume for one second, when measured by spirometry, is less than one liter, or the arterial oxygen tension is less than sixty mm/hg on room

air at rest; or

(4) Use portable oxygen; or

(5) Have a cardiac condition to the extent that the person's functional limitations are classified in severity as Class III or Class IV according to standard set by the American Heart Association; or

(6) Are severely limited in their ability to walk due to an arthritic, neurological, or orthopedic condition.

§ 1235.3 Special license plates.

(a) Upon application of a person with a disability which limits or impairs the ability to walk, each State shall issue special license plates for the vehicle which is registered in the applicant's name. The initial application shall be accompanied by the certification of a licensed physician that the applicant meets the § 1235.2(b) definition of persons with disabilities which limit or impair the ability to walk. The issuance of a special license plate shall not preclude the issuance of a removable windshield placard.

§ 1235.4 Removable windshield placards.

(a) The State system shall provide for the issuance and periodic renewal of a removable windshield placard, upon the application of a person with a disability which limits or impairs the ability to walk. The State system shall require that the issuing authority shall, upon request, issue one additional placard to applicants who do not have special

license plates.

§ 1235.5 Temporary removable windshield placards.

(a) The State system shall provide for the issuance of a temporary removable windshield placard, upon the application of a person with a disability which limits or impairs the ability to walk. The State system shall require that the issuing authority issue, upon request, one additional temporary removable windshield placard to applicants.

§ 1235.6 Parking.

Special license plates, removable windshield placards, or temporary removable windshield placards displaying the International Symbol of Access shall be the only recognized means of identifying vehicles permitted to utilize parking spaces reserved for persons with disabilities which limit or impair the ability to walk.

§ 1235.8 Reciprocity.

The State system shall recognize removable windshield placards, temporary removable windshield placards and special license plates which have been issued by issuing authorities of other States and countries, for the purpose of identifying vehicles permitted to utilize parking spaces reserved for persons with disabilities which limit or impair the ability to walk.

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Dare v. California, 1999 WL 717724 (9th Cir.(Cal.))

William Robert DARE; Gary Petillo, Plaintiffs-Appellees,

v.

STATE OF CALIFORNIA; Dept. Of Motor Vehicles, Defendants-Appellants.

No. 97-56065.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 15, 1999

Filed Sept. 16, 1999

Angela Sierra, Deputy Attorney General, San Diego, California, for the defendant-appellant.

Andrew R. Hall, Elizabeth Staggs-Wilson, Davis, Wright & Tremaine, Los Angeles, California, for the plaintiffs-appellees.

Appeal from the United States District Court for the Central District of California. J. Spencer Letts, District Judge, Presiding, D.C. No. CV-96-05569- JSL-ANx.

Before: Dorothy W. Nelson, Ferdinand F. Fernandez, and William A. Fletcher, Circuit Judges.

D.W. NELSON, Circuit Judge:

This case involves a challenge under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et seq. (West Supp.1999) ("ADA"), and its regulations to California's $6 biennial fee for disability parking placards. The State of California, Department of Motor Vehicles [hereinafter "California"], appeals the district court's grant of partial summary judgment in favor of William Robert Dare, Gray Petillo, and the class of plaintiffs they represent. California claims that the fee does not violate the ADA and that a blanket prohibition on such nominal fees is unconstitutional. We disagree and affirm the district court.

Facts and Procedural History

California has a comprehensive priority parking program for qualifying disabled individuals and veterans. *See* Cal. Veh.Code. §§ 295.5, 295.7 (West 1999). California provides these individuals with extensive priority parking and exemptions from all parking meter fees and most parking time restrictions. *See id.* §§ 22511.5, 22511.7, 22511.8. To prevent abuse, California limits access to these privileges to vehicles displaying state- issued disability license plates or parking placards. *See id.* §§ 22507.8, 22511.5. California imposes significant fines upon illegal use of disability parking spaces and authorizes local entities to establish enforcement units. *See id.* §§ 4461, 4463(d), 22507.9, 22511.8, 22511.56, 22511.58, 42001.5.

Registered vehicle owners who are disabled themselves or who use their vehicles to transport disabled individuals at least 51% of the time can obtain disability license plates. California charges the standard license plate fees for these special plates. *See id.* §§ 5007(a), 9250. In lieu of or in addition to a disability license plate, California issues disability parking placards to disabled individuals for a $6 fee. *See id.* § 22511.55. Individuals may use these portable placards in multiple vehicles. The placards expire if not renewed every two years, and California charges fees for renewal or replacement. *See id.* § 22511.55(a)(3) & (c)(2). The placard fees partly defray the cost of the disability parking program.

On August 13, 1996, Dare and Petillo, two disabled individuals, filed a class action lawsuit challenging California's $6 placard fee as a violation of ADA Title II and its promulgating regulations. Dare and Petillo allege that the fee constitutes an impermissible surcharge upon measures necessary to provide the nondiscriminatory treatment of individuals and groups required by the ADA. They rely on 42 U.S.C. § 12132, which states that "[s]ubject to the provisions of this subchapter, no qualified individual shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To prove the ADA's particular prohibition of surcharges on parking permits, Dare and Petillo cite 28 C.F.R. § 35.130(f), promulgated by the Department of Justice in implementing the ADA, which states that

> [a] public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. § 35.130(f) (1998).

The district court granted partial summary judgment with respect to the class of people qualifying as disabled under the ADA,[1] found the fee to be an impermissible surcharge, and ordered a permanent injunction against California's imposition of the fee. California timely appeals.

Jurisdiction

We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) (West Supp.1999) to review the district court's interlocutory order granting a permanent injunction. Because the district court's partial summary judgment order provides legal authority for the injunction and is thus inextricably bound with it, we also have jurisdiction to review that order. See Paige v. State of California, 102 F.3d 1035, 1040 (9th Cir.1996).

---

[1] Specifically, this plaintiff class included all purchasers of California placards since January 26, 1992 and future purchasers who are disabled under the ADA.

Standard of Review

We review for abuse of discretion the district court's grant of a motion for a permanent injunction, *see Gaudiya Vaishnava Soc. v. City of San Francisco*, 952 F.2d 1059, 1062 (9th Cir.1991), but review any determination underlying the grant of the motion by the standard that applies to that determination, *see Multnomah Legal Servs. Workers Union v. Multnomah County Legal Aid Serv.*, 936 F.2d 1547, 1552 (9th Cir.1991). We review de novo a district court's grant of a motion for partial summary judgment. *See Thompson v. Holy Family Hosp.*, 121 F.3d 537, 539 (9th Cir.1997).

Discussion

This case raises two main issues: (1) Does California's $6 placard fee violate Title II of the ADA and its implementing regulations, and, if so, (2) was Congress's enactment of Title II of the ADA a valid exercise of its power under § 5 of the Fourteenth Amendment to abrogate California's Eleventh Amendment immunity from suit? Because we answer both of these questions in the affirmative, we affirm the district court's grant of partial summary judgment and a permanent injunction against imposition of the placard fee.

I. Violation of ADA Title II

Analyzing whether California's $6 placard fee violates the ADA requires three inquiries. First, what obligations does Title II impose upon states regarding fees for measures under the

ADA? Second, does Public Law 100-641, 23 U.S.C. § 402 (West Supp.1999), which contemplates a fee for disabled parking placards as part of a uniform system for disabled parking, limit states' Title II obligations? Third, are these obligations violated by California's $6 fee for parking placards? As explained below, we conclude that the $6 fee constitutes a surcharge for required measures in violation of the ADA and its implementing regulations.

A. Obligation under Title II

In order to evaluate whether a fee constitutes a surcharge that violates Title II of the ADA, we conduct a two-part inquiry. First, as a threshold matter, we consider whether the measure for which California levies the fee is "required to provide that individual or group nondiscriminatory treatment" as mandated by the ADA. 28 C.F.R. § 35.130(f). If California charges for a measure not required under the ADA, the inquiry ends; 28 C.F.R. § 35.130(f) only forbids surcharges for "required" measures.

Second, we evaluate whether the fee for the measure is a surcharge; in other words, we consider whether it constitutes a charge that nondisabled people would not incur. If nondisabled people pay the same fee for an equivalent service, the charge to disabled people would not constitute a surcharge on a "required" measure. Thus, for example, a state can charge a fee for disabled license plates so long as it charges the same fee for nondisabled license plates.

Because surcharges against disabled people constitute facial discrimination, the meaningful access test formulated by the Supreme Court in *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), does not apply. Under this test, a court considers whether the allegedly discriminatory measure prevents "meaningful access to the benefit that the grantee offers." *Id.* at 301. The Ninth Circuit has applied this test in the ADA context to evaluating whether facially neutral laws violate § 12132. *See Hunsaker v. Contra Costa County*, 149 F.3d 1041, 1042-43 (9th Cir.1998); *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir.1996).

Using this standard in the context of facially discriminatory laws, however, would ignore the clear language of Title II. *Cf. Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 733-35 (9th Cir.1999) (holding that the reasonable modifications test does not apply to facially discriminatory laws because they present per se § 12132 violations). § 12132 covers not only "exclusion from participation in or [denial of] benefits of the services, programs, or activities of a public entity," but also being "subjected to discrimination by any such entity." 42 U.S.C. § 12132. By reviewing all § 12132 claims under a meaningful access test, this Circuit would focus only on exclusions and denials, and ignore completely the discrimination clause, not to mention the explicit language of the ADA regulation at issue here. Other courts evaluating fees similar to the one at issue here have read the statute and ADA regulation together rather than applying a meaningful access test. *See Thompson v. Colorado*, 29 F. Supp. 2d 1226, 1231 (D.Colo.1998); *Thrope v. State of Ohio*, 19 F.

Supp. 2d 816, 824 (S.D.Ohio 1998); *McGarry v. Director, Dept. of Revenue*, 7 F. Supp.2d 1022, 1028 (W.D.Mo.1998). We thus follow their approach and do the same; we hold that when states apply charges to required measures, we consider whether these fees constitute a surcharge forbidden under the ADA.

B. Effect of Public Law 100-641

The government urges us to view Public Law 100-641 and the regulations promulgated pursuant to it as justifying the placards surcharge. On November 9, 1988, prior to the passage of the ADA, Congress enacted Public Law 100-641, 23 U.S.C. § 402. This law indicates that the Secretary of Transportation shall issue regulations which: (1) establish a uniform system for handicapped parking designed to enhance the safety of handicapped individuals and (2) encourage adoption of such system by all the states. See id.

Pursuant to Public Law 100-641, the Department of Transportation (DOT) promulgated regulations in March 1991, eight months after Congress enacted the ADA. The DOT regulations provide in pertinent part that:

> Special license plates, removable windshield placards, or temporary removable windshield placards displaying the International Symbol of Access shall be the only recognized means of identifying vehicles permitted to utilize parking spaces reserved for persons with disabilities which limit or impair the ability to walk.

23 C.F.R. § 1235.6 (1998). DOT regulations further provide that each state shall issue special license plates upon the application of a person with a disability that impairs the ability to walk and that "[t]he fee for the issuance of a special license plate shall not exceed the fee charged for a similar license plate for the same class vehicle." Id. § 1235.3. In contrast to the provisions concerning license plate fees, neither Public Law 100-641 nor the regulations prohibit the imposition of placard fees.

The government's argument fails, however, because Public Law 100-641 is purely hortatory. See McGarry, 7 F.Supp.2d at 1026. Congress enacted Public Law 100-641 two years before the ADA and has no enforcement mechanism. Even California concedes that in recognizing principles of federalism and state sovereignty, Congress rendered state compliance with Public Law 100-641 completely voluntary.

In contrast, the ADA expressly applies to the states through Congress's Fourteenth Amendment powers, as discussed in more detail in Part II. Regulations promulgated pursuant to the ADA bind states so long as the regulations are not arbitrary, capricious, or contrary to the ADA. See Does 1-5 v. Chandler, 83 F.3d 1150, 1153 (9th Cir.1996). As discussed below, 28 C.F.R. § 35.130(f) meets that standard. We thus evaluate California's surcharge based on the requirements of Title II and 28 C.F.R. § 35.130(f). Public Law 100-641 does not impact our analysis.

C. Application to the California Fees

Applying this approach to the California fee at issue, we find the fee to be a surcharge for a required measure in violation of the ADA. The ADA requires special parking arrangements such as handicapped parking spaces. These spaces allow disabled people equal access to public buildings in which California provides services, programs, and activities. Because California polices handicapped parking spaces, disabled people need placards or license plates to use them. California thus meets the ADA's requirement for nondiscriminatory access to public buildings by providing disabled people with placards and license plates.

Furthermore, California's provision of license plates alone would not be sufficient to give individuals nondiscriminatory access to public places. In addition to the fact that many disabled people may not own cars or have someone who drives them 51% of the time, even those who do may sometimes have to use other vehicles as passengers or as drivers. They may rent cars or wish to drive with another person. To require disabled people to use only a designated car for which they have a license plate restricts them far more in accessing public places than people who lack their disabilities. This reasoning comports with cases by other courts that have struck down fees like the one in California. *See Thompson*, 29 F. Supp. 2d at 1231-32; *Thrope*, 19 F. Supp. 2d at 825; *McGarry*, 7 F. Supp. 2d at 1028.

Because providing the placards is a required measure under California's current program of providing access to

handicapped parking spaces, we turn to the question of whether charging the fee for them constitutes a forbidden surcharge. This issue hinges on whether California provides the same fee for an equivalent service for nondisabled people. In support of such equivalence, the appellees argue that the placard fee is comparable to, and probably less than, charges nondisabled people accrue at parking meters. California thus claims that if the $6 fee is viewed as a partial payment of waived meter fees, then disabled people are not being charged more than other people.

California's argument fails, however, because many public places do not have parking meters and people who lack disabilities face no fees in parking at those places. Such a distinction is unacceptable. Charging disabled people for parking that would otherwise be free constitutes discrimination in the provision of access to public buildings, a measure required under the ADA. We thus affirm the district court on this issue and hold that California's fee for handicapped parking placards violates the ADA.

II. Constitutionality

Having established an ADA violation, we turn to the constitutional issues raised by the government. This Circuit has held that in enacting Title II of the ADA, Congress validly abrogated state sovereign immunity pursuant to its Fourteenth Amendment powers. *See Clark v. California*, 123 F.3d 1267, 1270- 71 (9th Cir.1997). The majority of Circuits addressing

this issue have followed this Circuit's approach in *Clark*.[2]

We continue to adhere to our holding in *Clark* today. In light of the Supreme Court's recent decision in *Florida Prepaid Postsecondary Educational Expense Board v. College Savings Bank*, --- U.S. ----, 119 S.Ct. 2199, --- L.Ed.2d---- (1999) [hereinafter Florida Prepaid], and the circuit split on this issue, however, we provide further discussion of Title II of the ADA

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[2] *Compare Martin v. Kansas*, 1999 WL 635916, at *3-*6 (10th Cir. Aug.19, 1999), *Muller v. Costello*, Nos. 98-7491, 98-7729, 1999 WL 599285 (2d Cir. Aug.11, 1999) (page references not available) (holding that the ADA constitutes a proper exercise of Congress' Fourteenth Amendment powers), *Amos v. Maryland Dept. of Pub. Safety and Correctional Servs.*, 178 F.3d 212, 216-23 (4th Cir.1999) (same), *Kimel v. State of Fla. Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir.1998) (same), *Coolbaugh v. Louisiana*, 136 F.3d 430, 432-38 (5th Cir.1998) (same), cert. denied, --- U.S. ----, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998), and *Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481, 487 (7th Cir.1997), with *Alsbrook v. City of Maumelle*, No. 97-1825, 1999 WL 521709, at *4-*7 (8th Cir. July 23, 1999) (en banc) (holding that Title II of the ADA was not a valid exercise of Congress's § 5 powers), and *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 702-10 (4th Cir.1999) (holding that forbidding surcharges under the ADA exceeds Congress' Fourteenth Amendment powers). *See generally Torres v. Puerto Rican Tourism Co.*, 175 F. 3d 1, 4-5 (1st Cir.1999) (failing to reach the issue, in part, because of the dominant precedent upholding Congress' exercise of its Fourteenth Amendment powers in enacting the ADA); *Nelson v. Miller*, 170 F.3d 641, 648 & n. 7 (6th Cir.1998) (declining to reach this issue, but summarizing the state of the law). We note that the Fourth Circuit has ruled both that the ADA constitutes a proper exercise of Congress's § 5 powers, *see Amos*, 178 F.3d at 221-222 & n. 8, and that the regulation forbidding surcharges exceeds Congress's § 5 authority, *see Brown*, 166 F.3d at 702-10. Because we hold that regulations do not receive an independent constitutional assessment, see infra Subsection II.A.2, the Fourth Circuit authority is thus more in accord with than opposing our Fourteenth Amendment analysis.

as an appropriate Congressional exercise of its § 5 powers that thus accords with both the Tenth and Eleventh Amendments.

A. Eleventh Amendment

1. Title II of the ADA

When Congress both expresses unequivocal intent to abrogate immunity and also acts pursuant to its § 5 powers, a state's immunity is waived. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Clark*, 123 F.3d at 1269. As noted in *Clark*, "Congress has unequivocally expressed its intent to abrogate the State's immunity under ... the ADA," 123 F.2d at 1269. The focus of our discussion is therefore on why Title II constitutes a valid exercise of Congress's powers under § 5 of the Fourteenth Amendment.

The Court's recent decision in Florida Prepaid clarifies the congruence and proportionality test outlined in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). The first step of this test involves identification of the "Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy," using historical experience as a reference point. *Florida Prepaid*, --- U.S. at ----, 119 S.Ct. at 2207 (*quoting City of Boerne*, 521 U.S. at 525). The second step requires consideration of whether the provisions of the statute are proportional to their remedial or preventive goal. See id. at 2210 (*quoting City of Boerne*, 521 U.S. at 532).

Before applying this test to Title II of the ADA, we note that Congress's enforcement authority is at its apex when fashioning remedies aimed at the core Fourteenth Amendment guarantee of Equal Protection. *City of Boerne* and *Florida Prepaid* both emphasized Congress's power in dealing with discrimination, such as in the voting rights context. *See Florida Prepaid*, --- U.S. at ----, 119 S.Ct. at 2207; *City of Boerne*, 521 U.S. at 525-27. The Court explained that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative sphere of autonomy previously reserved to the States." *Florida Prepaid*, --- U.S. at ----, 119 S.Ct. at 2206 (quotation omitted); *City of Boerne*, 521 U.S. at 518 (internal quotation omitted).

a. Congruence

Although disabled people do not constitute a suspect class, the Equal Protection Clause prohibits irrational and invidious discrimination against them. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). When it enacted the ADA, Congress made specific factual findings of arbitrary and invidious discrimination against the disabled. *See id.* § 12101(a)(7). On the basis of these findings, Congress concluded that the ADA was a necessary legislative response to a long history of arbitrary and irrational discrimination against people with

disabilities. *See* 42 U.S.C. § 12101(b).[3] We thus hold that the ADA in general and Title II in particular satisfy the congruence requirement.

b. Proportionality

Having established the ADA's congruence with Congress's power to enforce the Equal Protection Clause, we turn to proportionality. In so doing, we reiterate the importance of deference to Congress in this analysis.[4] The Supreme Court has specifically found protections for people with disabilities to be an area in which Congressional judgment should be given great deference. *See Cleburne Living Center*, 473 U.S. at 442-43. [5]

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[3] A number of cases have held that the ADA constitutes a proper exercise of Congress' Fourteenth Amendment powers with specific reference to Congress's factual findings. *See Muller*, 1999 WL 599285, at ----, *Amos*, 178 F.3d at 218-19, *Kimel*, 139 F.3d at 1433, *Coolbaugh*, 136 F.3d at 435-38, *Crawford*, 115 F.3d at 486-87; *cf.* Timothy Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L.Rev. 393, 393-94 & nn. 1-4 (1991) (discussing Congress's extensive fact-finding and the history of state-sponsored irrational discrimination and animus against disabled people).

[4] As stated above, the Supreme Court has explicitly indicated that Congress's enforcement power to deter or remedy constitutional violations allows it to prohibit some constitutionally acceptable conduct, even in traditional areas of state autonomy, as part of its larger enforcement effort. *See City of Boerne*, 521 U.S. at 518 (*quoting Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)); *accord Florida Prepaid*, --- U.S. at ----, 119 S.Ct. at 2206 (*quoting City of Boerne*, 521 U.S. at 518).

[5] Discussing in Cleburne Living Center the legal protections to which individuals with developmental disabilities are entitled, the Court

The ADA is thus an appropriate exercise of § 5 powers if Congress enacted it in response to a widespread problem of unconstitutional discrimination that includes state programs and services and if the ADA's provisions are proportional to the scope of that discrimination.[6]

As noted above, Congress made extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face. *See* 42 U.S.C. § 12101(a). The ADA's particular provisions for each sector then indicate specifically the discrimination which is forbidden and the conduct needed to remedy the discrimination. *See* 42 U.S.C. § 12101 *et seq*. Although Title II's provisions may prohibit some State conduct which would pass muster under rational basis review, the Title's focus is on eliminating the discrimination outlined in the factual findings.

We thus agree with the Second Circuit and hold that "[i]n

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noted that "[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary." *Id.* The Court recently reinforced this approach in *Olmstead v. Zimring*, --- U.S. ----, 119 S.Ct. 2176, --- L.Ed.2d ---- (1999). Although declining to reach constitutional questions, *see id.* at 2181, the Court held that "unjustified isolation ... is properly regarded as discrimination based on disability," *id.* at 2185, and spoke approvingly of the ADA's efforts to end that isolation, *see id.* at 2187.

[6] We therefore disagree with the Eighth Circuit that the ADA's legislative record must "support the proposition that most state programs and services discriminate arbitrarily against the disabled" for abrogration of immunity to be appropriate.

light of Congress's findings of the extent of discrimination against people with disabilities and with due regard to the deference owed to Congress in making such judgments, we will not second-guess Congress's judgment that the ADA was targeted to remedy and prevent irrational discrimination against people with disabilities." *Muller*, 1999 WL 599285, at ----. Congress's findings were sufficiently extensive and related to the ADA's provisions that the provisions can "be understood as responsive to or designed to prevent, unconstitutional behavior." *Florida Prepaid*, --- U.S. at ----, 119 S.Ct. at 2210 (*quoting City of Boerne*, 521 U.S. at 532). Therefore, we hold that the ADA was a congruent and proportional exercise of Congress's enforcement powers under § 5 of the Fourteenth Amendment that abrogated Eleventh Amendment immunity.

2. Acceptability of 28 C.F.R. § 35.130(f)

Although California acknowledges the constitutionality of Title II of the ADA, it claims that the prohibition in 28 C.F.R. § 35.130(f) against states charging even de minimis administrative fees violates the Fourteenth Amendment. We disagree.

The primary flaw in the government's approach is that it conducts its Fourteenth Amendment analysis in a piecemeal manner. Because the statutory scheme as a whole constitutes a proper exercise of Congress' power to legislate under § 5, *see Clark*, 123 F.3d at 1270-71, regulations promulgated pursuant to the ADA "must be given 'legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary

to the statute.' " *Does 1-5*, 83 F.3d at 1153 (*quoting United States v. Morton*, 467 U.S. 822, 834, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984)).[7]

Here, the regulation is not arbitrary, capricious, or contrary to the ADA. *See id.* Title II protects the rights of disabled people to have the same public services, programs, and activities as those who are not disabled. *See* 42 U.S.C. § 12132. If public entities place a surcharge on measures that help disabled people achieve this parity, disabled people then are

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[7] As the Supreme Court stated in Olmstead:

> [b]ecause the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect. We need not inquire whether the degree of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is in order; "[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance.' "

--- U.S. ----, 119 S.Ct. at 2186, --- L.Ed.2d---- (*quoting Bragdon v. Abbott*, 524 U.S. 624, 642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (internalquotation and citation omitted)).
In taking this approach, we reject the reasoning of the Fourth Circuit in *Brown*, which determined that "separation of powers, administrability, and federalism" required an examination of "the legality of the specific statute and regulation whose asserted violation by the state government gave rise to the claim for relief in federal court." Brown, 166 F.3d at 705. In our view, a piecemeal analysis of the regulations would unduly constrain Congress's power to construct a statutory scheme addressing discrimination; the federal courts, in effect, would have a line-item veto over legislation directed at intentional or arbitrary discrimination by the states.

paying fees others do not and so are not being treated equally.

Forbidding such additional charges is a solution aimed at preventing this type of discrimination; it addresses the improper approach to funding services for the disabled, see 28 C.F.R. § 35.130(f), while leaving states broad flexibility to administer and fund their programs otherwise, *cf. Duprey v. State of Conn., Dept. of Motor Vehicles*, 28 F.Supp.2d 702, 708 (D.Conn.1998) ("If the DMV wants to pass on the costs of providing placards, rather than absorbing the costs itself, it must pass the cost on to all parkers, and not just those disabled individuals protected by the ADA."). The rationale for this regulation thus dovetails neatly with the purposes of Title II. We therefore hold that 28 C.F.R. § 35.130(f) has controlling weight.

B. Tenth Amendment

Because Title II falls within Congress's Fourteenth Amendment powers, it does not conflict with powers reserved to the states under the Tenth Amendment. *See Ex parte Virginia*, 100 U.S. 339, 344-47, 25 L.Ed. 676 (1879); *see also Armstrong*, 124 F.3d at 1024-25. We thus hold that the ADA does not violate the Tenth Amendment.

Conclusion

The California placard fee violates the ADA and its implementing regulations. Because the ADA constitutes an appropriate exercise of Congress's enforcement powers under

§ 5 of the Fourteenth Amendment, California's Tenth and Eleventh Amendment challenges fail. Furthermore, we accord 28 C.F.R. § 35.130(f) controlling weight as an regulation promulgated pursuant to the ADA that is not arbitrary, capricious, or contrary to the statute. We therefore AFFIRM the district court's grant of summary judgment in favor of appellees and of a permanent injunction against imposition of the surcharge.

AFFIRMED.

FERNANDEZ, Circuit Judge dissenting:

Because I cannot agree that the small fee California charges for placards violates the ADA, I dissent.

California has sought to ameliorate the parking problems that those with disabilities can face when they use automobiles to attend to business, recreation or any of the other pursuits of daily life. To that end, special parking places are set aside and marked for the sole use of disabled people. *See, e.g.,* Cal. Veh.Code §§ 22511.7, 22511.8. In addition, unlimited parking is available in zones in which others may only park for a limited time, and disabled people need not pay parking meter fees. *See* Cal. Veh.Code § 22511.5. It is one thing, however, to set aside spaces and confer other benefits, but quite another to assume that only disabled people will take advantage of those opportunities. Others may well succumb to the temptation to park in the special spaces, which are generally more convenient to the place one is going and which may well be open when all other desirable spaces are filled. Therefore, California not only has made the spaces available, but also has created a method that helps to assure that the spaces, and other benefits, will remain available for disabled people only.

Under California law, a disabled person who owns a motor vehicle can obtain a license plate, which contains a special symbol--the International Symbol of Access, "commonly known as the wheelchair symbol." Cal. Veh.Code § 5007. As interpreted by the DMV, the license plate is also available to any person who is not disabled, if the vehicle is used to

transport a disabled person at least fifty-one percent of the time. There is no charge for the license plate beyond that which is paid by every other person who registers an automobile with the DMV.

California, however, also decided to add more flexibility to the program. It recognized that many disabled persons may be driven by others, who do not do so fifty-one percent of the time, and that it would be beneficial if the other person's automobile could also be parked in the special parking spaces when a disabled person was transported. Therefore, California provided for the issuance of special placards, which are portable and can be used in any automobile that is being driven or utilized by a disabled person. *See* Cal. Veh.Code § 22511.55; *see also* Cal. Veh.Code § 22511.56 (misuse of placards). While license plates are issued to every automobile, the special placard is a unique item which is issued to disabled persons only. It, therefore, imposes special costs upon DMV. In order to defray a portion of those added costs, California has imposed a small fee upon those who apply for the placard. That fee is, basically, six dollars every two years. *See* Cal. Veh.Code §§ 22511.55(a)(2), 22511.55(a)(3). That does not pay for the full cost of issuing placards, and in a typical two-year cycle, 1995-1996, DMV's costs exceeded the fee revenues by $1,182,829. That fee is the subject of this litigation. This case deals with a sensitive area which lies at the border of federal and state relationships. Ours is a system of dual sovereignty, and some care must be taken when Congress wishes to have the states carry out congressional policies. The states are not mere adjuncts of the federal government. *See, e.g., Printz v. United*

States, 521 U.S. 898, ----, 117 S.Ct. 2365, 2376-77, 138 L.Ed.2d 914 (1997). That broods over this case as we undertake the task of deciding whether California violated the ADA when it enacted a placard fee, which amounts to twenty-five cents per month. Dare argues that it did. If so, and if Congress could constitutionally prohibit that, the district court's decision must be upheld. California attacks both parts of that conjunctive sentence. Because I agree that the ADA was not violated, I see no need to consider the more thorny constitutional portion of the sentence. But that is getting slightly ahead of the story, for I should start with the ADA itself.

That statute, as relevant here, provides that "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. On its face, it would not seem that the fee in question here can be said to, somehow, deny disabled people the benefit of any services offered to the public by California, or that it can be said to discriminate against them. But, of course, the bare words of the statute are not the only law in this area.

The United States Department of Justice is responsible for interpreting and implementing that provision of the ADA. *See* 42 U.S.C. § 12134. It has issued various regulations and guidelines. In explaining its understanding of the requirements of the ADA, the DOJ has stated that "a public entity should provide an adequate number of accessible parking spaces in

existing parking lots or garages over which it has jurisdiction." 28 C.F.R. Pt. 35 App. A at 457. There is no dispute that California has provided special parking places for disabled persons with vehicles.

The dispute in this case is over whether California has violated a DOJ regulation, which provides that:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. § 35.130(f); *see also* Americans with Disabilities Act, DOJ Technical Assistance Manual (Title II), Section II--3.5400. I would hold that California has not violated that provision.

Certainly, California has not, in as many words, excluded disabled persons from any program generally offered to the public. If a failure to make special parking places available could be said to exclude them from the use of some other program, California has not failed to provide for the spaces themselves. No doubt the spaces are available in the sense that they have been set aside. California, however, has sought to assure that those who are not disabled will not use the spaces. No doubt, its method of doing so can inhibit use by a disabled person because the only rational way to provide the extra

assurance is to police usage by placing some sort of special symbol on the parked automobile. Even that is not a perfect solution, of course, because people could use counterfeit permits or otherwise abuse the program. *See* Cal. Veh.Code §§ 4463, 22511.56. Nevertheless, that it does help cannot be doubted.

Under the ADA, as it relates to the issues before us, the most that California is required to do is make accessible parking places available at public facilities. *See* 28 C.F.R. § 36.304(a)(18). That, of course, does not, itself, even require special designation or signing. In fact, one could conceive of a situation where all spaces in a parking area were quite accessible. At any rate, there is no claim that California has not made spaces available. In fact, it has gone far beyond that and has provided for overtime parking in zones limited for everyone else and for free metered parking. *See* Cal. Veh.Code § 22511.5.

Nothing in the law requires that California police usage of the spaces in order to assure that only disabled people are taking advantage of them. Indeed, if the federal government decided that usage must be policed by the states, that would come at least parlously close to an attempt to "commandeer state government" into enforcing a federal government policy at state cost. *See Printz*, 521 U.S. at ----, 117 S.Ct. at 2381. No doubt the provision of spaces has many costs, not the least of which is the expense of setting aside and signing special spaces, perhaps larger than normal, which may go unutilized a good part of the time, and which surely have less usage than

other parking spaces. I, of course, need not address those costs. California has willingly accepted them.

California has also accepted the cost, if any, of issuing special license plates for disabled persons who have their own vehicles, which need to be parked, as well as for those who transport disabled people most of the time. *See, e.g.*, Cal. Veh.Code § 5007. I need not decide whether California could impose a charge for that enhancement of the parking program because, again, California has not sought to do so. In that regard, however, it is interesting to note that Congress passed a statute designed to "encourage" states to adopt a uniform system for handicapped parking. *See* Act of Nov. 9, 1988, Pub.L. No. 100-641, 102 Stat. 3335 § 3 (1988) (Handicapped Parking System Provision (HPS)). It did so before the enactment of the ADA, but at a time when the Rehabilitation Act of 1973 was in effect. See 29 U.S.C. § 701-796l. At that point, Congress indicated that a uniform policy should provide for special license plates for which there should be no charge. *See* HPS § 3(b)(1)(B)& (D). It also indicated that the uniform policy should provide for placards. *See* HPS § 3(b)(1)(C). However, Congress did not indicate that no fee should be charged for placards. The regulations under the HPS are also to the same effect. *See* 23 C.F.R. §§ 1235.3, 1235.6. These hortatory suggestions by Congress might be one reason that California has not chosen to impose a fee for the special license plates. It also suggests that Congress did not see anything particularly discriminatory in the exaction of a small fee for the issuance of placards, if any were issued at all.

As it is, California has decided to confer upon disabled people the still further benefit of a system under which they can drive or be driven in any automobile at all, and still use the special parking places, as well as take advantage of other special parking benefits. That is, California did set up an optional flexible placard program. That complemented the already optional enforcement program which was designed to assure that spaces would not only be provided, but also that they would remain available. As I see it, nothing in the ADA or the regulations precludes California from making a small charge for those additional benefits.

I, of course, recognize that a disabled person can argue that he does not really care at all about having a vigorous enforcement program, which greatly enhances the opportunities of all disabled people to use the special parking places, and even helps make it possible to confer still further parking privileges upon them. In other words, a disabled person could say, "Fine, just set aside and mark the spaces, but do not force any additional benefits upon me, even at a nominal cost." I do not see any reason to believe that Congress did, or that California or we need to, take that kind of reasoning seriously.

Moreover, I fail to see how a charge of twenty-five cents per month, which accords all of those benefits above and beyond the bare provision of spaces, can be dubbed a violation of the ADA on the theory that the costs of state programs that are required to preclude discriminatory treatment have been placed upon disabled persons. No cost of a generally available program has been so levied; rather an expanded ability to use

the special parking spaces has been afforded. With or without enhancement, the spaces remain, and even they are one step removed from any particular state program as such.

In short, the placard enhancement allows for great flexibility in the use of the special spaces, affords even further parking opportunities, and helps assure that the spaces will actually be available for those who need them. The fact that a disabled person, who does not have a car of his own or a car which is used for disabled people most of the time, needs to pay what amounts to twenty-five cents per month to be able to use the special spaces does not put the cost of the parking space program upon him; it only visits a minute part of the cost of the enhancement upon him.

That being said, what of the district court cases which are to the contrary? *See Thompson v. Colorado*, 29 F. Supp. 2d 1226, 1231-32 (D.Colo.1998); *Duprey v. Connecticut*, 28 F. Supp. 2d 702, 709-11 (D.Conn.1998); *Thrope v. Ohio*, 19 F. Supp. 2d 816, 824-25 (S.D.Ohio 1998); *McGarry v. Director, Dep't of Revenue*, 7 F. Supp. 2d 1022, 1027-29 (W.D.Miss.1998). Those cases appear to presume either that some form of enforcement is required, or that the state has chosen to enhance the availability of spaces and that is the state's problem. *See, e.g., Thompson*, 29 F. Supp. 2d at 1232; *Duprey*, 28 F. Supp. 2d at 709. As already noted, I see no violation centered on the fact that a state has exacted a small charge for the purpose of enhancing the benefits available to disabled persons beyond those absolutely required by law. I, therefore, do not accept that particular form of reasoning. The

district court cases also note that without placards the program could not be as flexible as it is because, for example, a disabled person who is being driven in another person's car could not confer the right to park in a special space upon the driver. *See, e.g. Thrope*, 19 F. Supp. 2d at 825; *McGarry*, 7 F. Supp. 2d at 1028. Moreover, they say, a disabled person may wish to rent or borrow a car, which did not have a special license plate, and would not have access to a special space in that instance. And, they say, free license plates do not help in those regards.[1] *See id.* Again, that puts the cart before the horse. It assumes that the state must not only make spaces available, but also provide for all possible permutations of desire to use those spaces, without asking for any fee to help defray the cost of the enhanced usage possibilities. I see no persuasive basis for that assumption. It simply fails to recognize that the states are not discriminating against disabled people when they undertake to police the use of spaces, nor are they discriminating when they ask for a small fee to enable them to do that policing in an efficient fashion. There is, by the way, nothing before us to suggest that the fee exceeds that which the DMV charges other people for services it performs for them, or that the fee is in an excessive or discriminatory amount whose design injures disabled people. Far from it. The fee does not even cover the cost of issuing the

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1 It is interesting to note that a somewhat ambiguous opinion letter from the DOJ suggested that a free license plate program was a satisfactory alternative to a placard program. See DOJ Opinion Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division to Congressman C.W. Bill Young, (Apr. 29, 1996). I, however, do not put any significant weight upon that missive.

placards.[2]

In fine, the ADA is an anodyne which serves to assuage some of the sufferings of disabled persons. California does not disagree with that general goal, and insists that it did not deprive disabled persons of any rights when it imposed a nominal fee upon those who sought to obtain parking placards, which provide great flexibility in the use of the special parking spaces that California has already made available. I agree with that assessment of the situation, and determine that the district court abused its discretion when it issued the permanent injunction against the DMV.

In reaching my conclusion, I limit myself to the facts at hand--a fee that comes to twenty-five cents per month to help defray the cost of issuing the placard. I do not reflect upon whether the state could charge a vastly greater sum for the placards. Nor do I consider other programs or fees charged for them. Nor, for that matter, do I consider whether the federal government can constitutionally impose program costs upon the states in this fashion. As I see it, those issues are, for now,

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2 The best argument against this small and reasonable placard fee is, it seems to me, that there are some disabled people who can drive most cars and who wish to borrow or rent cars from time to time. They are, I believe, the only ones who can reasonably complain at all about the fee in any event. But even if the fee were invalid as applied to them, that would not justify the breadth of the injunction issued by the district court and approved of today.

beyond our ken.[3]

Thus, I respectfully dissent.

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3 It should be pointed out, however, that one Court of Appeals and at least one District Court have declared that an attempt to enforce the surcharge regulation in federal court violates the Eleventh Amendment. See Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698, 706-08 (4th Cir.1999); Hedgepeth v. Tennessee, 33 F.Supp.2d 668, 674-77 (W.D.Tenn.1998); see also Alsbrook v. City of Maumelle, No. 97-1825, 1999 WL 521709, at *7 (8th Cir. July 23, 1999) (en banc). But cf., Clark v. California, 123 F.3d 1267, 1269-71 (9th Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 2340, 141 L.Ed.2d 711 (1998). Again, I see no need to decide that issue in this case. If I did, I am inclined to agree with those courts rather than with the majority.